

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

KENNY PENA,

Defendant.

18-cr-637 (JSR)

ORDER

JED S. RAKOFF, U.S.D.J.:

The Court has received a pro se motion filed by defendant Kenny Pena seeking appointment of counsel and, ultimately, resentencing. As relevant here, Pena was convicted under 18 U.S.C § 924(c) of one count of brandishing a firearm in connection with a crime of violence, to wit attempted Hobbs Act robbery.

Pena argues that the Supreme Court's decision to declare unconstitutional section 924's so-called residual clause, § 924(c)(3)(B), in United States v. Davis, 139 S.Ct. 2319 (2019), invalidates his conviction and sentence. "After Davis, only offenses that qualify as crimes of violence under the still-valid 'elements clause,' 18 U.S.C. § 924(c)(3)(A), can serve as predicate crimes of violence under § 924(c)(1)(A)." United States v. Waite, 12 F.4th 204, 210 (2d Cir. 2021). But the Second Circuit has held that attempted Hobbs Act robbery is a predicate for § 924(c) under the "elements clause." United States v. McCoy, 995 F.3d 32, 57 (2d Cir. 2021). McCoy thus forecloses Pena's Davis challenge to his conviction and sentence. Waite, 12 F.4th at 212.

Accordingly, Pena's motion is denied.

SO ORDERED.

New York, NY
April 18, 2022


JED S. RAKOFF, U.S.D.J.